

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

SCOTT C. SMITH,

Plaintiff,

v.

GINA PENROSE, LT. CREWSE,  
RICHARD MORGAN, MARGE  
LITTRELL, LYNNE DELANO,  
ELDON VAIL, and JAMES  
HARTFORD,

Defendants.

NO. CV-06-0148-LRS

**ORDER DENYING MOTION FOR  
PRELIMINARY INJUNCTION**

**BEFORE THE COURT** is Plaintiff's Motion for Preliminary Injunction (Ct. Rec. 14) filed pursuant to Fed. R. Civ. P. 65 on July 24, 2006. Defendant asks the Court to enjoin Defendants from the "continuous use of the cover-up and retaliatory conduct of the sexual assault by [D]efendant Penrose upon [P]laintiff as a basis for classification, administrative segregation, and the disciplinary processes...and to immediately release [P]laintiff from Intensive Management Unit ('IMU'), and place him at Twin Rivers Unit at Monroe Correctional Complex." Ct. Rec. 14 at 1-2. This motion was filed by Scott C. Smith, who is appearing *pro se* for the purposes of these proceedings.

1                                   **I. BACKGROUND**

2           Plaintiff is a Washington State prison inmate currently  
3 incarcerated at the Stafford Creek Corrections Center (SCCC).  
4 Plaintiff alleges that his Constitutional rights were violated when he  
5 was sexually harassed by Defendant Penrose, and retaliated against by  
6 Defendants Crewse, Morgan, Littrell, Vail and Hartford for reporting  
7 this assault. Ct. Rec. 14 at 2.

8           Plaintiff alleges that Penrose, a Department of Corrections  
9 Counselor, attempted to "engage [Plaintiff] in sexual activity in  
10 exchange for a custody promotion, facility transfer and earned time  
11 credits." Ct. Rec. 17 at 2. Plaintiff further alleges that, upon his  
12 refusal to engage in sexual activity with Defendant Penrose, Defendant  
13 Penrose threatened Plaintiff by telling him "you'll never get a  
14 promotion or transfer". *Id.* Plaintiff alleges that the sexual  
15 assault violated his rights under the Eighth Amendment of the  
16 Constitution (*Austin v. Terhune*, 367 F.3d 1167, 1171 (9th Cir. 2004))  
17 and was prohibited under RCW 9a.44.160. Ct. Rec. 15 at 9.

18           Plaintiff further alleges that Defendant Penrose retaliated  
19 against him by making recommendations to deny a custody promotion,  
20 facility transfer, earned time credits, and by later inappropriately  
21 acting as the Classification Chairperson and approving her own  
22 recommendations. Ct. Rec. 15 at 10.

23           Plaintiff also alleges that Defendants Crewse, Morgan, Littrell,  
24 Vail and Hartford unlawfully retaliated against him by intercepting  
25 and confiscating Plaintiff's mail on four occasions (Ct. Rec. 15 at  
26

1 11, 15, 17, and 18), threatening Plaintiff with isolation time and  
2 being labeled a 'snitch' (Ct. Rec. 15 at 12), placing Plaintiff in  
3 involuntary protective custody (Ct. Rec. 15 at 13-14), placing  
4 Plaintiff in Administrative Segregation (Ct. Rec. 15 at 19-20),  
5 finding Plaintiff guilty of a disciplinary infraction (Ct. Rec. 15 at  
6 21), placing Plaintiff in disciplinary isolation for ten days (Ct.  
7 Rec. 15 at 22), transferring Plaintiff to the IMU (Ct. Rec. 15 at 23),  
8 subjecting Plaintiff to repeated cell moves, searches, strip searches,  
9 and level demotions (Ct. Rec. 15 at 24), and transferring Plaintiff to  
10 SCCC (Ct. Rec. 15 at 25).

11 For the reasons set forth below, Plaintiff's Motion for  
12 Preliminary Injunction is **DENIED**.

## 13 II. DISCUSSION

14 To obtain a preliminary injunction, Plaintiff must demonstrate  
15 either "(1) a likelihood of success on the merits and the possibility  
16 of irreparable injury or (2) the existence of serious questions going  
17 to the merits and the balance of hardships tipping in [Smith's]  
18 favor." *Nike, Inc. V. McCarthy*, 379 F.3d 576, 580 (9th Cir. 2004)  
19 (quoting *Gilder v. PGA Tour, Inc.*, 936 F.2d 417, 422 (9th Cir. 1991)).

20 Injunctive relief is an "extraordinary and drastic remedy" (*Canal*  
21 *Authority of the State of Florida v. Callaway*, 489 F.2d 567, 573 (5th  
22 Cir. 1974)), and should be used only in "clear and plain" cases.  
23 *Rizzo v. Goode*, 423 U.S. 362, 378 (1976). When a Plaintiff seeks to  
24 enjoin the activity of a government agency, there is a long-standing  
25 rule that the government must be "granted the widest latitude in the  
26

1 dispatch of its own internal affairs". *Walters v. Reno*, 145 F.3d  
2 1031, 1048 (9th Cir. 1998). In cases involving state prison  
3 authorities, the judiciary must afford even more deference to the  
4 actions taken by those officials. *Turner v. Safley*, 482 U.S. 78, 85  
5 (1987).

6 **A. PRISON LITIGATION REFORM ACT**

7 Plaintiff's Motion for Preliminary Injunction is governed by the  
8 Prison Litigation Reform Act, 18 U.S.C. § 3626 (PLRA). Under the  
9 PLRA, Plaintiff must show that: (1) one or more of his federal rights  
10 have been violated; (2) that the relief sought is narrowly drawn and  
11 does not extend further than necessary to correct the violation; and  
12 (3) the relief sought uses the least intrusive means necessary to  
13 correct the violation. 18 U.S.C. § 3626(a)(1)(A). On the basis of  
14 these standards, Plaintiff fails to demonstrate that he is entitled to  
15 preliminary injunctive relief.

16 Defendant argues that Plaintiff is not entitled to preliminary  
17 injunction because Plaintiff's motion does not satisfy any of the  
18 three PLRA criteria. (Ct. Rec. 22 at 5). Plaintiff's memorandum (Ct.  
19 Rec. 15) filed in support of his Motion for Preliminary Injunction  
20 does not address the PLRA, nor does Plaintiff's Reply in Support of  
21 Preliminary Injunction (Ct. Rec. 24).

22 **1. PRISONER MUST SHOW VIOLATION OF A FEDERAL RIGHT**

23 Plaintiff appears to claim violation of his federal rights on two  
24 grounds: (1) the alleged sexual assault by Defendant Penrose, and (2)  
25 retaliatory actions of prison officials, (Ct. Rec. 15 at 2).  
26

1 Plaintiff has not met his burden with regard to either claim and is  
2 not entitled to preliminary injunctive relief.

3 Plaintiff alleges that Defendant Penrose, a Department of  
4 Corrections Counselor, violated Plaintiff's Eighth Amendment rights by  
5 attempting to engage in sexual contact in exchange for favorable  
6 treatment. Ct. Rec. 15 at 2. Defendant claims that he has "proved he  
7 was sexually assaulted by Penrose." Ct. Rec. 15 at 25. Defendant  
8 argues that Plaintiff's proof is nothing more than his own affidavit  
9 (Ct. Rec. 17), supported by declarations of fellow inmates that were  
10 found to be fraudulent by a Department of Corrections investigation.  
11 See Ct. Rec. 16-1 Exhibit 37. The Court agrees with Defendant that  
12 Plaintiff has failed to support his claim with anything more than bare  
13 allegations. Moreover, the Court notes that the Plaintiff is no  
14 longer housed in the prison where he alleges these violations  
15 occurred, and therefore, cannot show an ongoing constitutional  
16 violation.

17 Plaintiff alleges that Defendants retaliated against him by  
18 refusing to grant a custody promotion and transfer to the Twin Rivers  
19 Unit (TRU) at the Monroe Correction Complex. Ct. Rec. 15 at 3. The  
20 Ninth Circuit has long held that, though prisoners do not have a  
21 constitutional right to particular custody levels or facility  
22 placements, transfers and demotions may violate a prisoners First  
23 Amendment rights if they are motivated by a desire to curtail a  
24 prisoners protected speech activities. *Pratt v. Rowland*, 65 F.3d 802,  
25 806 (9th Cir. 1995). To find that such a violation has occurred,

1 Plaintiff must show that "the prison authorities' retaliatory action  
2 did not advance legitimate goals of the correctional institution or  
3 was not tailored narrowly enough to achieve such goals." *Id.* Plaintiff  
4 must also show that his constitutional rights were actually chilled.  
5 *Resnick v. Hayes*, 213 F.3d 443, 449 (9th Cir. 2000). Retaliation  
6 claims must be evaluated with the deference accorded to prison  
7 officials. *Pratt*, 65 F.3d at 807. Absent factual support, bare  
8 allegations of retaliation are insufficient. *Rizzo*, 778 F.2d at 532  
9 n.4; accord *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989).

10 Plaintiff alleges that he was denied transfer to TRU and custody  
11 promotion by Defendants in retaliation for his efforts to expose the  
12 alleged sexual assault by Defendant Penrose. However, Plaintiff has  
13 failed to show that no legitimate correctional goals were advanced by  
14 the transfer and disciplinary actions taken by the prison officials.  
15 In fact, a number of exhibits attached to Plaintiff's Statement of  
16 Undisputed Facts demonstrate that Defendants consistently acted in  
17 furtherance of legitimate penological goals. See Ct. Rec. 16-1  
18 Exhibits 20, 22, 27, 28, 29, 31, 36, 38 and Ct. Rec. 16-2 Exhibits 39-  
19 47, 50, 59, 61 and 62. Further analysis of the merits of Plaintiff's  
20 claims will wait until the parties' motions for summary judgment are  
21 ripe for this Court's review. However, Plaintiff is no longer  
22 incarcerated at the prison where he alleges the violations occurred,  
23 and therefore, cannot claim an ongoing constitutional violation.  
24 Plaintiff's allegations are insufficient to demonstrate that  
25 Defendants violated his federal rights by retaliation.

1           **2. RELIEF SOUGHT MUST BE NARROWLY DRAWN AND LEAST INTRUSIVE**  
2           **MEANS POSSIBLE**

3           Defendants also argue that the relief sought is not narrowly  
4 tailored to correct the alleged violations and is not the least  
5 intrusive means to correct the alleged violations. Ct. Rec. 22 at 7-  
6 8. Because Plaintiff has not established that a violation of his  
7 Federal rights has occurred, the Court need not rule on the second and  
8 third prongs of the PLRA.

9           **B. PRELIMINARY INJUNCTION UNDER FED. R. CIV. P. 65**

10           **1. LIKELIHOOD OF SUCCESS ON THE MERITS**

11           Plaintiff argues that he is entitled to a preliminary injunction  
12 because his claim is likely to succeed on the merits. Ct. Rec. 15 at  
13 25. For the reasons stated above, the Court finds that Plaintiff has  
14 not established that he is likely to prevail on the merits and  
15 therefore, a preliminary injunction is not appropriate. However,  
16 further examination of the merits of this case will occur when  
17 Plaintiff's Motion for Summary Judgment (Ct. Rec. 45), and Defendants'  
18 Cross-motion for Summary Judgment (Ct. Rec. 60) are ripe for review.

19           **2. POSSIBILITY OF IRREPARABLE INJURY**

20           Plaintiff also argues that he is entitled to a preliminary  
21 injunction because he has suffered an irreparable injury. Ct. Rec. 15  
22 at 27. Plaintiff cites *Warsoldier v. Woodford*, for the proposition  
23 that an allegation of a First Amendment claim is sufficient to  
24 establish an irreparable injury. 418 F.3d 989 (9th Cir. 2005).  
25 However, as discussed above, Plaintiff has not demonstrated that an  
26 ongoing retaliatory First Amendment violation is occurring. Further,

1 as argued by Defendant, even if all of the Plaintiff's allegations are  
2 true, Plaintiff has not shown that any of them are likely to result in  
3 irreparable injury if he is not transferred to TRU and granted a  
4 custody promotion. As noted above, Plaintiff is not currently  
5 incarcerated at the facility in which he alleges the violations  
6 occurred. Thus, Plaintiff has not demonstrated that he is likely to  
7 suffer irreparable injury if a preliminary injunction is not granted.

8 **3. BALANCE OF POTENTIAL HARMS and PUBLIC INTEREST**

9 Plaintiff states that the balance of potential harms favors  
10 granting a preliminary injunction because he has been subject to  
11 adverse living conditions resulting from various transfers and  
12 disciplinary actions undertaken by Defendants. Ct. Rec. 15 at 28-32.  
13 Defendants argue that the potential harms faced by the Department of  
14 Corrections and the public are great because allowing offenders to  
15 force custody level promotions or transfers on the basis of  
16 unsupported allegations threatens the safety and security of  
17 corrections facilities. Because the conditions and location of a  
18 prisoners incarceration are at the sole discretion of prison officials  
19 (*Turner*, 482 U.S. at 84-85), the Court finds that Plaintiff has not  
20 established that the balance of hardships and interests of the public  
21 favor granting Plaintiff's motion for preliminary injunction.

22 For the aforementioned reasons, Plaintiff has failed to  
23 demonstrate that he is entitled to preliminary injunctive relief under  
24 either Fed. R. Civ. P. 65 or the PLRA. Accordingly, Plaintiff's  
25 Motion for Preliminary Injunction (Ct. Rec. 14) is **DENIED**.



*s/Lonny R. Suko*

ORDER - 9